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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/663,212

09/15/2003

Jack A. Dant

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CROMPTON, SEAGER & TUFTE, LLC  
1221 NICOLLET AVENUE  
SUITE 800  
MINNEAPOLIS, MN 55403-2420

EXAMINER

SWIGER III, JAMES L

ART UNIT

PAPER NUMBER

3775

MAIL DATE

DELIVERY MODE

04/08/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>		<b>Applicant(s)</b>	
	10/663,212		DANT, JACK A.	
	<b>Examiner</b>		<b>Art Unit</b>	
	JAMES L. SWIGER		3775	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 30 December 2008.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-4, 6-11, 14-16, 18-22, 28 and 29 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-4, 6-11, 14-16, 18-22, 28 and 29 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 9/19/2008 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____.                                     |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____.   | 6) <input type="checkbox"/> Other: _____.                         |

## DETAILED ACTION

### *Claim Rejections - 35 USC § 102*

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 3-4, 6, 9, 11, 14-15, 18-19, 21-22, 28-29 are rejected under 35 U.S.C. 102(b) as being anticipated by **Burgin** (US Patent **4,165,746**).

Burgin discloses a device useful as a portal for use in a spinal implantation procedure comprising a base (26) that also has a length, which may further be considered a bridge member, a first paddle (56) and a second paddle (54), both pivotally coupled to the base, wherein the first and second paddles are considered dimensioned to fit in a disc space and are considered pivotal with respect to one another. Compare figs. 1 and 2 to see how the two paddles are pivotal with respect to one another. Burgin also discloses that this device can have many uses, including the holding open of a body orifice or incision (Col. 4, lines 15-20). The first and second paddles are also capable of being pivotal about generally horizontal axes between an open and closed position, and wherein in the closed position the first and second paddles are in a horizontal orientation and considered approximately parallel to the base, and in an open position where the first and second paddles are approximately perpendicular to the base. Burgin further discloses a device that has paddles having a first, second, third and fourth sides (as shown in 54/56). The first and second sides are

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approximately parallel having a length between, and the 3<sup>rd</sup> and 4<sup>th</sup> sides are approximately parallel and have a width. The first and third sides are approximately perpendicular. Generally, this means that the shape of the paddle is approximately square or rectangular. Burgin discloses paddles of several slightly different orientations, however, fig. 15 has a shape that closely matches a shape having an approximately square or rectangular shape. Additionally, the paddles as disclosed have major surfaces that face towards the bridge member when in a closed position (in the horizontal orientation) and face towards each other when in the open position (perpendicular to the bridge or base) and the paddles have rounded corners.

Burgin further discloses a portal device having a pivot hinge (32) that connects a first paddle to the base and a second pivot hinge (opposite), where paddles are considered connected at opposite ends the curves shown in the paddles may be considered lordotic curves, as they could conform to the lordotic curvature of the spine. It is further noted that when the paddles are in an open position, they create a portal window, as the space allows for sight into the area (approx at line 5-5 in Fig. 1). Burgin further discloses an actuator (28/30) having a handle that is rotated to move the paddles (compare Figs. 1 and 2).

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 7-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Burgin in view of Marino (US Patent 6,290,724). Burgin discloses the claimed invention except for a paddle having surface irregularities including serrations. Marino discloses a paddle-like device useful in distraction (See Figs. 8, 12, and 13) that has surface serrations (36). These serrations help to anchor the distractor into place when performing distraction. It would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the device of Burgin having at least serrations and surface irregularities in view of Marino so that the distractor can be better held in place when used.

Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Burgin in view of Estes et al. (US Patent 6,241,729). Burgin discloses the claimed invention except for a distraction mechanism paddle made from a radiolucent material. Estes discloses a distraction system that has a tip (136) that may be made of a radiolucent material (Col. 3, lines 10-20). Use of a radiolucent material is old and well known in the art as it allows a device to not impede fluoroscopic imaging if it is being used to visualize the surgical area during a procedure. It would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the device of Burgin having at least a distraction mechanism made of a radiolucent material in view of Estes et al. to better visualize the surgical area during a procedure.

Claims 2, 16, and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Burgin '746. Burgin discloses the claimed invention except for the paddles having specific heights, thicknesses, or widths. It would have been an obvious matter of design

choice to construct the device of Burgin having specific heights, thicknesses, or widths, since such a modification would have involved a mere change in the size of a component. A change in size is generally recognized as being within the level of ordinary skill in the art. In re Rose, 105 USPQ 237 (CCPA 1955).

### ***Response to Arguments***

Applicant's arguments, see arguments, filed 12/30/2008, with respect to the rejection(s) of claim(s) 1-4, 6-11, 14-16, 18-22 and 28-29 under Burgin '424 have been fully considered and are persuasive. Therefore, the rejection has been withdrawn. However, upon further consideration, a new ground(s) of rejection is made in view of Burgin (US Patent 4,165,746).

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. See PTO-892.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JAMES L. SWIGER whose telephone number is (571)272-5557. The examiner can normally be reached on M-F, 9am-5:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Barrett Thomas can be reached on 571-272-4746. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/JAMES L. SWIGER/  
Examiner, Art Unit 3775

/Thomas C. Barrett/  
Supervisory Patent Examiner, Art  
Unit 3775